In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

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ATTILLIO SEMERIA, FRED FATTOR, CHARLES OSTERLYE, RALPH ROW, F. B. CODY, GEORGE MCBEAN, JACK MILLS, GALE PICKARD, ADOLPH LORENZETTI and CHARLES HARDY,

Petitioners,

vs.

THEODORE ROSENBERG, GUSSIE ROSENBERG, DOROTHY AIRHART, JUNE HOROWITZ and SIDNEY ROSENBERG, individually and as copartners transacting business under the firm name of American Building Maintenance Co. (a copartnership), and AMERICAN BUILDING MAINTENANCE CO. (a copartnership),

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners Attillio Semeria, Fred Fattor, Charles Osterlye, Ralph Row, F. B. Cody, George McBean, Jack Mills, Gale Pickard, Adolph Lorenzetti and Charles Hardy, pray that a writ of Certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Ninth Circuit entered August 17, 1943.

OPINIONS BELOW.

The opinion and dissenting opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 1306-1312) are not yet reported. The opinion of the District Court (R. 147-176) is reported at 45 F. Supp. 128. The judgments of the Circuit Court of Appeals were entered August 17, 1943. (R. 1313-1315.)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. Code, Section 347.)

STATUTES INVOLVED.

These actions were brought under the Fair Labor Standards Act of 1938. (52 Stat. 1060, 29 U. S. C. Section 201, et seq.) The pertinent sections of the foregoing statutes are set forth in the appendix, infra, pages i-iii.

QUESTIONS PRESENTED.

1. Whether employees who make habitable the establishments of banks engaged in interstate commerce by performing janitorial services necessarily required by the banks in order to perform their interstate transactions and whose services are necessary and indispensable to the conduct by the banks of their interstate business are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938.

2. Whether a bank in the performance of its multiple daily functions is engaged in the production of goods for commerce as well as engaged in commerce.

STATEMENT.

This petition relates to three final judgments of the United States Circuit Court of Appeals for the Ninth Circuit reversing three final judgments of the District Court of the United States for the Northern District of California, Southern Division, granting recovery to petitioners herein for unpaid overtime compensation and additional equal amounts as liquidated dam-

ages and attorneys' fees. This petition is necessarily upon a single record, inasmuch as the three appeals were upon a single record. The suits were instituted pursuant to Section 16(b) of the Fair Labor Standards Act of 1938. The cases in the Circuit Court entitled "Rosenberg et al., Appellants, v. Semeria, et al., Appellees (10282), and Rosenberg, et al., Appellants, v. Lorenzetti, Appellee (10283)" were tried together in the District Court. The issues and evidence in the case entitled "Rosenberg, et al., Appellants, v. Hardy (10284)", it was stipulated, were "substantially the same" as in the other two. (R. 1222-1223.)

Respondents are a copartnership which renders janitorial services for owners and lessees of apartment houses, office buildings and the like on a contractual basis. Among those having contracts with respondents are Wells-Fargo Bank & Union Trust Company, the American Trust Company, and The Anglo-California National Bank of San Francisco. (R. 890-891; 1066; 1074; 1082; 1090; 898; 906; 915; 923; 122; 862; 1223; 933.) These banks are engaged in interstate commerce (R. 238-483; 499-550; 595-613; 1122-1143), and this was conceded by respondents in the Court below. (R. 1307.)

Petitioners are employees employed and paid by respondents to do the janitorial work in these banks pursuant to the afore-mentioned service contracts. (R. 40-41; 1046-1048; 1223-1224.) They sweep, mop and dust, empty waste-paper baskets, polish cuspidors, clean toilets and wash down the walls thereof, vacuum

rugs, empty ink-wells, sweep the sidewalks, etc. (R. 936.)

It was conceded that "no overtime was paid to any of these janitors for the first 48 hours of their work in any week" (R. 494), and there was agreement as to the amounts that would be owing if petitioners were held covered by the Act. (R. 993-995; 1240-1266.) The District Court rendered judgments awarding overtime compensation, liquidated damages, attorneys' fees and costs to the petitioners against respondents. (R. 191; 1170; 176.)

In its findings of fact and conclusions of law the District Court held as follows (R. 178-190; 1157-1169; 1268-1280):

1. Each of the banks was "an industry engaged in interstate commerce" and "an instrumentality of interstate commerce", made constant use of "interstate and foreign communication facilities" and was constantly involved in "interstate communication of a business nature". (R. 181; 1160; 1271; 187; 1166; 1277.)

2. The banks "could not properly carry on * * * business without the janitorial services". They depended "to a considerable degree" upon the appearance of their establishments "to inspire public confidence", and, as their officers and employees could not work properly in buildings "littered with dirt and debris", the work of the janitors was "indispensable" to the banks' business. The janitorial services "facilitated" the banks' interstate business

and the janitors were, therefore, engaged in interstate commerce within the meaning of the Act. (R. 183-184; 1162-1163; 1273-1274.)

3. The janitors were the employees of The Maintenance Company and were not employees of the banks. (R. 183; 1162; 1273; 188; 1167; 1278.)

4. The Maintenance Company was not a "service establishment" within the meaning of Section 13(a)(2) and the employees were not, therefore, excluded from the benefits of the Act. (R. 184; 188; 1163-1164; 1167; 1274-1275; 1278.)

5. The Act was not unconstitutional as applied to the Maintenance Company or to the employees. (R. 186-187; 188-189; 1165-1166; 1167-1168; 1277; 1278-1279.)

6. None of the claims were barred by California statutes of limitations. (R. 189; 1168; 1279.)

In consonance with its finding that the work of the janitors was "indispensable" to and "facilitated" the business of the banks the Court held the janitors to be within the coverage of the Act. (R. 169.)

The Circuit Court of Appeals reversed, holding that the holding in *McLeod v. Threlkeld,* ..... U. S. ..... (June 7, 1943), was controlling. The Circuit Court further held that petitioners were not in any sense engaged in production, nor were their activities integrated with the production of goods, thereby distinguishing the case from *Kirschbaum Co. v. Walling,* 316 U. S. 517. (R. 1308.)

In the dissenting opinion, Mr. Justice Denman held that the judgment should be affirmed as to all petitioners except Semeria, holding that petitioners were engaged " 'in actual work upon transportation (interstate) facilities' as that phrase is used in *McLeod v. Threlkeld,* 218 (sic.) U. S. ..... (June 7, 1943)." Mr. Justice Denman also pointed out that not only were the services of petitioners a direct aid to interstate commerce, but that it was conceivable that a bank which had no janitorial services and permitted the litter of its transactions and its dust and dirt to accumulate would cease to function. (R. 1309-1310.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that petitioners were not engaged in commerce within the meaning of the Act.

2. In holding that petitioners were not engaged in the production of goods for commerce within the meaning of the Act.

3. In reversing the judgment of the District Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. THE DECISION OF THE COURT BELOW AFFECTS THOUSANDS OF EMPLOYEES THROUGHOUT THE UNITED STATES AND HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This is the only litigated case involving janitors who devote their entire time to the maintenance of premises used solely by a bank for the purpose of conducting its interstate and foreign banking businesses. The janitors do no other work. Consequently in the thousands of banks throughout the United States there are multiple thousands of similar employees who will be directly affected by the decision involved herein.

This is an important question of federal law which has not been, but should be, settled by this Court. To date four judges have passed upon this question in this case and have divided equally. Hon. A. F. St. Sure, District Judge, held petitioners were entitled to the benefits of the Act, as did Mr. Justice William Denman in his dissenting opinion in the Court below. Mr. Justices William Healy and Francis A. Garrecht held in the majority opinion of the Court below that petitioners were not entitled to the benefits of the Act.

2. THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER A BANK IS ENGAGED IN PRODUCING GOODS FOR COMMERCE WHEN IT CREATES CHOSES IN ACTION IS ERRONEOUS IN THAT IT CONFLICTS WITH SPECIFIC PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938, AND WITH THE DECISION OF THIS COURT IN KIRSCHBAUM CO. v. WALLING, 316 U. S. 517.

Since the bank actually "produced" or issued various types of commercial paper such as drafts, bills of exchange, letters of credit, and also new issues of stock, it was literally engaged in the production of goods within the meaning of sections 3j and 3i of the Act. In addition, it supplied information on request to investors. (R. 508-512.) "Intelligence or information", the Supreme Court has pointed out, is a subject or article of commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103; *International Textbook Co. v. Pigg*, 217 U. S. 91. Similarly, printed or written materials and commercial instruments of all types have been considered articles of commerce. *Champion v. Ames*, 188 U. S. 321; *Almy v. California*, 24 How. 169.

See also:

United States v. Ferger, 250 U. S. 199, 205;

Bracey v. Darst, 218 Fed. 482, 495-496 (N. D. W. Va.);

Oklahoma-Texas Trust Co. v. Securities and Exchange Comm., 100 F. (2d) 888, 890 (C. C. A. 10);

Geiger-Jones Co. v. Turner, 230 Fed. 233 (S. D. Ohio).

If the banks are engaged in the production of goods for commerce, the janitors are subject to the Act

under *Kirschbaum Co. v. Walling,* supra, and the decision of the Court below conflicts with the decision of this Court in the *Kirschbaum* case. Even if the banks are only engaged in commerce, as distinguished from production, the decision of the Court below conflicts with the decision of this Court in the *Kirschbaum* case because that case held maintenance men indispensable. This is pointed out by Mr. Justice Denman in his dissent in the Court below. (R. 1310.)

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3. THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER EMPLOYEES MAINTAINING AN INSTRUMENTALITY OF COMMERCE ARE COVERED BY THE ACT CONFLICTS WITH THE DECISION OF THIS COURT IN OVERSTREET v. NORTH SHORE CORPORATION, 318 U. S. 125.

In *Overstreet v. North Shore Corporation,* supra, this Court held that employees maintaining an instrumentality of commerce are covered by the Act. This Court stated that the services involved were a direct aid to interstate commerce. In the instant case the instrumentality of commerce is a bank rather than a highway, but the employees bear the same relation to its maintenance as the employees in the *Overstreet* case bore to the maintenance of that instrumentality. This analogy was specifically commented upon by Mr. Justice William Denman in his dissenting opinion in the instant case where he stated:

> "There seems no difference between removing the discarded papers used in the interstate banking transactions, cleaning the ink wells after their use in writing and signing such documents,

making habitable by janitorial services the premises *necessarily* required to perform such interstate transactions and the functions of the railway gang which cleans the passenger coaches carrying persons interstate. Both appear services necessary to the conduct of interstate business. In both cases they are engaged 'in actual work upon the transportation (interstate) facilities' as that phrase is used in McLeod v. Threlkeld, 218 U. S. ..... (June 7, 1943)." (R. 1309.)

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4. THE DECISION OF THE COURT BELOW WITH RELATION TO THE COVERAGE TO BE EXTENDED TO EMPLOYEES ENGAGED IN COMMERCE CONFLICTS WITH THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT IN BURTON v. ZIMMERMAN, 131 FED. (2d) 377.

In *Burton v. Zimmerman,* supra, it was held that whether janitors who maintain office buildings, the tenants of which were engaged in interstate commerce, were entitled to the benefits of the Fair Labor Standards Act of 1938, depended upon the facts of each case, and depended upon whether or not the services of the janitors were essential to such commerce. The decision of our Court below holds that regardless of whether the services of janitors in establishments engaged in commerce are a direct aid to such commerce and are indispensable to such commerce, such janitors are not entitled to any benefits under the Fair Labor Standards Act of 1938.

5. **THE DECISION OF THE COURT BELOW ON THE QUESTION OF WHETHER THE JANITORS INVOLVED ARE ENGAGED IN COMMERCE CONSTITUTES A MISINTERPRETATION OF THE DECISION OF THIS COURT IN McLEOD v. THRELKELD, ... U. S. ..... (JUNE 7, 1943), AND IS IN CONFLICT WITH SAID DECISION.**

In the *McLeod* case this Court held that a cook for maintenance workers of a railroad was not engaged in commerce. The instant case concerns the maintenance workers themselves. Furthermore, in the *McLeod* case the cook was held too remote from "transportation", the only possible "commerce" in the case. In the instant case "commerce" is "trade, commerce, transmission or communication". The bank is the instrumentality which conducts the commerce as the railroad or highway conducts transportation, and the employees involved herein maintain the bank as the employees in the *Overstreet* case maintained the highway.

In the dissenting opinion Mr. Justice Denman correctly interprets the *McLeod* case and holds that petitioners herein are entitled to coverage under the language of the *McLeod* case. (R. 1309.) Following such holding Mr. Justice Denman states:

> "Merely cooking food for the men who maintain an interstate right of way seems a step substantially removed from cleaning the cars used in such transportation. Because an interstate bank's premises are immobile and the cars move is no ground of distinction. For an analogy to support the majority opinion the Supreme Court would have to hold that one employed in the cleaning of railway tools and tool houses, both

facilities of the maintenance of way men, was not serving interstate commerce.

The question is whether the services are a direct aid to interstate commerce. Here it is not only such an aid but it is conceivable that a bank which had no janitorial service and permitted the litter of its transactions and its dust and dirt to accumulate would cease to function. I can see no difference between the 'porters (who) keep the buildings clean and habitable' for the men and processes for the production of goods for commerce held within the Act in Kirschbaum Co. v. Walling, 316 U.S. 517, 519, and the janitors who keep the buildings clean and habitable for the men and processes in interstate banking. I do not believe that McLeod v. Trelkeld overruled, sub silentio Kirschbaum Co. v. Walling." (R. 1309-1310.)

The interpretation accorded the *McLeod* case by the majority opinion of the Circuit Court curtails coverage of the Act as enunciated by this Court in *Overstreet v. North Shore Corporation,* supra; *Pedersen v. Fitzgerald Construction Co.,* 63 Sup. Ct. 558; *Walling v. Jacksonville Paper Co.,* 63 Sup. Ct. 332, and *Overnight Motor Co. v. Missel,* 316 U. S. 572. We do not believe it was the intent of this Court in the *McLeod* case to overrule the foregoing cases *sub silentio.* Those cases extended a coverage which entitled petitioners to the judgments rendered in their favor in the District Court. The coverage so extended is admirably expressed by Mr. Justice Murphy in the *Overstreet* case:

> "Respondent contends * * * that their (the employees') activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'. We said in the *Jacksonville Paper Co.* case, *supra,* 'It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations. *Jacksonville Paper Co.* case, *supra,* and see also *Shanks v. D. L. & W. R.,* 239 U.S. 556, 558, dealing with what will shortly be pointed out as a similar question in the coverage of the Federal Employers' Liability Act. (63 Sup. Ct. 497.)"

In the *McLeod* case this Court stated that the employee involved supplied the personal needs of the maintenance-of-way men, and that food was consumed "apart from their work". This is the distinguishing feature of the instant case. Petitioners do not perform their work apart from the bank. They are the maintenance men. They constitute an essential part of the bank's business.

CONCLUSION.

Petitioners respectfully submit that a writ of certiorari should issue.

Dated, San Francisco, California,
September 3, 1943.

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CHARLES R. GARRY,
ALBERT PICARD,
FRANCIS MCCARTY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 3, 1943.

MILTON D. SAPIRO,
Counsel for Petitioners.

(Appendix Follows.)